IN THE

Supreme Court of the United States

No. 118

October Term, 1942.

HOWARD KIKER,

Petitioner-Plaintiff,

vs.

THE CITY OF PHILADELPHIA, BERNARD SAMUEL, Acting Mayor of Philadelphia, DAVID W. HARRIS, Receiver of Taxes, and ERNEST LOWENGRUND, Acting City Solicitor,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WITH BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WITH BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Howard Kiker, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania contained in that Court's opinion and entered in the above-entitled cause on March 29, 1943[1] (Record, p. 25a), affirming the decree of Common Pleas Court No. 4 of the County of Philadelphia (p. 23a),[2] which dismissed petitioner's class bill for injunction.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Plaintiff, a domiciliary resident of New Jersey, has been for the last sixteen years "regularly employed by the United States of America, in the Federal area known as the League Island Navy Yard, near the said City of Philadelphia (but not a part thereof), as a supervisor, planner and estimator in the Industrial Department of said Navy Yard." (pp. 2a, 3a)

Title to the Federal area in which plaintiff worked had been acquired by the United States through deeds of conveyance from private owners. (p. 3a) Supplementing these conveyances, the Commonwealth of Pennsylvania had ceded jurisdiction over the lands conveyed to the United States by three successive acts: The Act of March 29, 1827, (P. L.

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[1] Appellate practice in the Pennsylvania Supreme Court dispenses with the necessity of entry of judgment upon filing the opinion of the Court in the clerk's (prothonotary's) office.

[2] Page references in parentheses are to the appeal record, unless otherwise stated.

153);[3] the Act of February 10, 1863 (P. L. 24);[4] and the Act of April 4, 1866 (P. L. 96).[5] Pursuant to an Act of Congress approved February 18, 1867 (14 U. S. St. at L. c. 46, p. 396) a certificate of acceptance for the lands thus ceded, dated December 23, 1868, was recorded in the Office of the Recorder of Deeds of Philadelphia County. (pp. 3a, 27a). As a result of these several Acts the power to tax persons and property on League Island was vested exclusively in the United States for so long as it should maintain a navy yard there.

In 1932 the Commonwealth of Pennsylvania adopted the Sterling Act (1932, P. L. 45) and thereby delegated to cities of the first and second classes (Philadelphia being of the first class) the power "to levy, assess and collect * * * such taxes on persons, transactions, occupations, privileges, objects and personal property *within the limits of such city* of the first and second class as it shall determine"* except in cases where the State itself had already imposed or might thereafter impose such taxes. Thereafter, on December 13,

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[3] Cedes and conveys "all the jurisdiction, right, title, property and interest of this commonwealth, over, in and to, the territory now in possession of the United States and occupied as a navy yard, included within the present wall around the same, * * *"

[4] "* * * ceding to the United States of America the right of exclusive legislation over League Island, in the Delaware river, in the county of Philadelphia—for naval and other purposes, according to the terms of the constitution of the United States" and providing in Section 3 that upon acceptance by the United States, "the sovereignty and right to exclusive jurisdiction over all the said premises shall be vested in the United States."

[5] "That in order to vest in the United States of America the complete title and jurisdiction, for naval, and national uses, over all League Island, and its appurtenances, with the water basin, or channel, between it and the mainland, together with the northerly shores thereof—the consent of this commonwealth is hereby granted * * *"

* Italics supplied. The Act **in extenso** is printed in the Appendix hereto, p. 24.

1939, the City of Philadelphia promulgated its present income tax ordinance, there being then no state income tax in effect. (pp. 3a, 4a, 42a). This ordinance imposed an annual tax of 1½% "on salaries, wages, commissions, and other compensation earned after January 1, 1940, by residents of Philadelphia, and on salaries, wages and other compensation earned after January 1, 1940, by nonresidents of Philadelphia for work done or services performed or rendered in Philadelphia." (p. 6a and Appendix p. 26).

This ordinance in its application to Navy Yard employees resident in Philadelphia was upheld in *Phila. v. Schaller*, 148 Pa. Super. 276, and *certiorari* was denied by this Court on October 12, 1942, 87 L. ed. (Adv. ops.) 38, 63 Sup. Ct. 43; but that decision did not touch on the tax status of nonresidents of Philadelphia. Prior to 1941 no attempt was made to enforce the ordinance against Federal employees at League Island Navy Yard who were not resident in Philadelphia, but on October 9, 1940, Congress had enacted Public Act #813 (4 USC sec. 14 *et seq.*) providing, by section 2, that persons living or earning income in a Federal area would not be relieved by reason of such residence or employment, from liability to pay an income tax levied by a state or any duly constituted taxing authority "having jurisdiction to levy such a tax." This Act was construed by the City Solicitor as making liable to the City wage tax those Federal employees at League Island who had previously been treated as exempt, and these were thereupon threatened with prosecution if they did not file returns and submit to assessment. (p. 7a).

This suit was brought to enjoin such attempted enforcement of the ordinance. The case was heard and determined in the court of first instance upon Bill of Complaint filed December 16, 1942, and Preliminary Objections thereto filed the following day. These objections, in effect a demurrer to the bill, were argued on December 28, 1942, before Com-

mon Pleas Judge Bluett, who sustained the objections and dismissed the bill in an opinion filed December 31, 1942 (p. 13a). From a final decree entered on January 5, 1943, an appeal was taken to the Supreme Court of Pennsylvania, which affirmed the decree by a vote of four to two, the majority opinion by Drew, J. (p. 25a), and the minority opinion by Maxey, C. J. (p. 44a), being filed on March 29 last.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Sec. 344 (Judicial Code, Sec. 237 as amended).

After asserting in his bill of complaint that the City had no power to impose the tax in question upon nonresidents of the City for services rendered outside the City, and that the City was attempting to tax persons who received no protection or benefit from the city, petitioner further alleged "that such attempt, if successful, will result in the taking of plaintiff's property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution." (p. 8a).

This claim to a violation of rights guaranteed by the Federal Constitution was rejected by the Common Pleas Court. The contention was reasserted on appeal to the Supreme Court of Pennsylvania, this being the highest court of that state in which a decision could be had. That court affirmed the lower court.

There was thus drawn into question in this litigation in the state courts the validity of the attempted enforcement of a municipal tax ordinance, there attacked on the ground that such enforcement was repugnant to the Fourteenth Amendment of the Constitution of the United States, and

violative of rights, privileges and immunities given by that Amendment, and especially set up and claimed by the petitioner.

THE QUESTIONS PRESENTED.

The questions for determination here are the following:

Where the United States, Acting under Article I, Sec. 8, Par. 17 of the Constitution, has accepted from a State the cession of part of its territory and thereby acquired the exclusive power to tax persons therein, does a City in that State, of which the federal area was a part prior to said cession, gain from the United States this attribute of "exclusive legislation" in said area without formal cession and acceptance thereof, but merely by virtue of a general act of Congress (U. S. C., Title 4, Sec. 14 et seq.) which declares that "no person shall be relieved from liability for an income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area * * *"?

If such federal Act may be construed as ceding to the City the power to tax wages of federal employees in a federal area adjoining such city, is the act effective *ex proprio vigore* to extend the scope of a preexisting City ordinance, which imposes a wage tax on persons residing or working within the city's borders, so as to cover nonresident federal employees working within said adjoining federal area?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The decision of the Pennsylvania Supreme Court that U. S. Public Act 819 has the effect of enlarging the scope of the Philadelphia Income Tax Ordinance of December 13, 1939, so as to render taxable nonresident workers in the United States Naval Reservation at League Island, is not in accord with applicable decisions of this Court (as shown in the accompanying brief of petitioner).

II. The State Court should have held that Public Act 819 was not effective to enlarge the taxing powers of the City of Philadelphia, or to extend the effect of its existing wage tax ordinance to federal employees working at League Island Navy Yard but nonresident in Pennsylvania, because—

(a) At the time of the passage of the Tax Ordinance the Naval Reservation at League Island was part of the United States, enjoyed no protection from the City, and hence was not subject to the Ordinance;

(b) The subsequent passage of U. S. Public Act 819 did not touch the Naval Reservation, since the words "Federal area" as used in the Act did not embrace lands previously ceded to the United States;

(c) Under no valid construction of Public Act 819 may the United States be held to have ceded the sovereign power of taxation theretofore vested in it, back to the ceding State or directly to the City;

(d) Even if cession had been intended, it was not and could not be accepted by the City;

(e) Even if acceptance could be presumed, the new power of taxation thus supposedly ceded or granted to the City would have had to be exercised by adoption of a new ordinance. The federal Act could not of itself extend the scope and force of the preexisting tax ordinance.

III. Involved in this cause is the question of the power of the several states and their lesser taxing authorities to tax the wages of nonresident Federal employees in hundreds of Federal areas throughout the country. The relation of U. S. Public Act 819 to this asserted power in the states and their municipalities has not been authoritatively defined, and judicial determination thereof is a matter of wide public concern.

For these reasons it is respectfully submitted that this petition should be granted.

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Camden, New Jersey.
June, 1943.

BRIEF IN SUPPORT OF THE PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion by Bluett, J. speaking for Common Pleas Court No. 4 of the County of Philadelphia is not reported. It appears in the record submitted herewith (p. 13a *et seq.*).

The Supreme Court of Pennsylvania affirmed it by a divided vote. The majority opinion by Drew, J., reported in 346 Pa. 624, 31 A. (2d) 289, 291, will be found in the record at pages 25a *et seq.* The minority opinion by Maxey, C. J., reported in 346 Pa. 640, 31 A. (2d) 298, will be found in the record at pages 44a *et seq.*

THE STATUTES INVOLVED.

This cause involves Pennsylvania Public Law 45 of 1932 (The Sterling Act); the Philadelphia Income Tax Ordinance of Dec. 13, 1939, and U. S. Public Act No. 819 (4 U. S. C. Sec. 14 *et seq.*), the pertinent provisions of all of which enactments are set forth in an appendix hereto.

JURISDICTION.

Jurisdiction is invoked pursuant to Section 344 of Title 28 U. S. C., and as more particularly set forth in the foregoing petition.

STATEMENT OF THE CASE.

The Summary Statement in the foregoing petition contains all material facts.

The points of law to be considered are as therein set forth in the "Reasons Relied on for Allowance of the Writ," and will be here developed *seriatim*.

ARGUMENT.

(a) At the time of the passage of the Tax Ordinance the Naval Reservation at League Island was part of the United States, enjoyed no protection from the City, and hence was not subject to the Ordinance.

This proposition was recognized by the majority as well as the minority opinion in the Pennsylvania Supreme Court and therefore need not be further developed. It had been also the point of decision in *Manlove v. McDermott*, 104 Super. Ct. 560, pp. 562, 563; in *Burke v. Aspromet*, 4 Workmen's Compensation Supplement 2566, p. 905, and in *Haggerty v. O'Brien Bros.*, 21 Luzerne 7, all of which held that the Navy Yard lay outside the geographical limits of Philadelphia.

The City wage tax ordinance itself, by Sec. 10, forbade its application "to any person or property as to whom or which it is beyond the legal power of Council to impose the tax * * *". The power of Council was derived from the Sterling Act, which expressly limited the delegated power to tax as one exercisable only "within the limits of such

city" (1932, P. L. 45). And back of this Act was the State Constitution (Art. IX, Sec. 1) prescribing that "all taxes shall be * * * within the territorial limits of the authority levying the tax."

Consistent with the want of any power to tax property upon, or earnings of nonresidents of Philadelphia employed on, League Island, the City of Philadelphia has never attempted to provide any of its municipal facilities for use in that area, nor to afford any benefit or protection to those resident or working there as such residents or workers. (p. 3a). League Island is a self-contained community, wholly independent of both state and city (except for the reserved right of the state's writs to run therein).

(b) The subsequent passage of the U. S. Public Act 819 did not touch the Naval Reservation, since the words "Federal area" as used in the Act did not embrace lands previously ceded to the United States.

The effective enactment is found in Sec. 2 (a) of Act 819:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; * * *"

It will be noted that the phrases "any state" and "any duly constituted taxing authority" (here the City of Philadelphia) are modified by the phrase immediately following them: "having jurisdiction to levy such a tax,". Without radical alteration of the sentence structure as well as of the

natural and usual meaning of the latter phrase, it is difficult to deny to it the effect of limiting the right to tax employees in a Federal area to those municipalities already possessing such right, or "jurisdiction".

The majority opinion below objects to this plain meaning of the words of the Act on the ground that it would "nullify this legislation". The court therefore assigns to the phrase "jurisdiction to levy such a tax" the quite different significance of "jurisdiction to levy *this type of tax*". Of the construction urged by plaintiff it says:

> "Such a construction is the equivalent of saying that Congress merely intended to authorize states to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation. Cf. *Superior Bath Co. v. McCarroll*, 312 U. S. 176, 178. The phrase in question is obviously descriptive of the language preceding it and refers to the *power* of the taxing authority to impose the type of tax mentioned; it does not refer to its jurisdiction over the territory." (pp. 41a, 42a).

The fallacy in this statement by the lower Court is exhibited by the remaining language of Section 2, which unmistakably uses "jurisdiction" to embrace territorial limitation. It declares:

> ": and *such* State or *taxing authority* shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." (Italics supplied.)

By "*such . . . taxing authority*" the Congress clearly meant a city with limited territorial jurisdiction, for the "full

jurisdiction and power" given to levy and collect taxes "in any Federal area within such state" could not be exercised by a municipality except in a Federal area lying within the bounds of such City. Philadelphia, for instance, could not enforce its wage tax against employees in a Federal area in Pittsburgh, although this would be the literal effect of the criterion suggested by the Court below, namely, jurisdiction "to impose the type of tax mentioned." Unless we read the phrase "such taxing authority" both with reference to the preceding portion of the section, and as embracing a territorial limitation upon the power to tax, the absurd result would follow that any municipality with power to impose a wage tax could tax persons in any Federal area "within such state." We must therefore, in assigning a reasonable intention to the Congress, give to the limiting phrase "having jurisdiction to levy such a tax" its full and natural significance of embracing any and all limitations, whether those having regard to territory, or those regarding such other restraints as may have surrounded the taxing power at the time Act 819 was adopted.

The majority opinion apparently recoils from a construction of the Act which would make it merely declaratory. But this is no ground for condemning it. Declaratory acts are no novelty. All of our uniform state laws are declaratory; and the usual function of a Code is to declare the law. The historic reason and need for declaring by this Act the law as it had been recently developed in *Graves v. New York, ex. rel. O'Keefe,* 306 U. S. 466, and kindred decisions, —as well as its relation to the Public Salary Tax Act (5 U. S. C. Sec. 84a)—are clearly stated in Chief Justice Maxey's dissenting opinion, at pages 49a to 54a of the record. The State Superior Court in *Phila. v. Schaller,* 148 Pa. Super. Ct. 276, had previously said, with reference to Act 819:

> "It is not necessary to refer to the reason for this act. For our purpose we need only observe that it is no more than declarative of the existing law as established by *Graves v. People of State of New York ex rel. O'Keefe.*"

Even if the declaratory construction insisted on below and here were "absurd" (which it is not), still courts cannot by decision supply a meaning which the words of the Act manifestly do not contain. As the late Mr. Justice Holmes said for this Court:

> "If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective."
>
> *U. S. v. Plowman*, 216 U. S. 372, 375.

But there is further evidence in the Act that it was not intended to apply to lands *ceded* to the United States. "Federal area" is therein defined (Sec. 6-c) as "any lands or premises *held or acquired* by or for the use of the United States or any department, establishment or agency of the United States." (Italics ours.) What is significant in this definition is the omission of any reference to lands held by the United States as the result of cession of sovereignty. The words "held or acquired" are appropriate only to lands conveyed or leased or which have been taken by condemnation proceedings. There is no suggestion of any purpose on the part of Congress to make its enactment applicable to the distinctive class of lands sovereignty over which has been ceded to the United States.

(c) Under no valid construction of Public Act 819 may the United States be held to have ceded the sovereign power of taxation theretofore vested in it back to the ceding State or directly to the City.

In view of the admitted premise that the City had no power prior to Act 819 to tax nonresidents on League Island, it is obvious that if such a power is now to be recognized, the Act must be construed as ceding to the City the sovereign power of taxation heretofore vested solely in the United States. Indeed, assumption must go the length of recognizing that Act 819 extended the geographical bounds of Philadelphia to include League Island, as only in this way could the City obtain jurisdiction over those who work therein but reside in other states. To this length the court below was driven, but did not plainly so declare.

It did declare this to be a case of *retrocession to the State* of the taxing powers previously ceded by it to the Federal government (p. 31a), but since it is not the State but the City (i. e. "a duly constituted taxing authority therein") that is claiming to exercise a power derived directly from Congressional grant, the majority opinion has not met the issue. There are no words appropriate either to cession or retrocession to be found in the Act. The phrase "having jurisdiction to levy such a tax" must have been addressed to a preexisting jurisdiction, not to one bestowed by the Act itself. We look in vain throughout the Act for evidence of intention by Congress to cede its taxing powers to this municipality—evidence which, lacking in the Federal Act, cannot, as the majority opinion suggests, be supplied by the report of a sub-committee of Congress. *U. S. v. Mo. Pacific Rwy. Co.*, 278 U. S. 269, 277, 278; *Marchese v. U. S.* (5th Cir., 1942), 126 F. (2d) 671, 674; *Comm. Internal Rev-*

enue v. Rabenold, (2nd Cir., 1940), 108 F. (2d) 639, 641.

So critical a consequence as a surrender of sovereign powers is not a matter for implication, but for express grant. *Erie Rwy. Co. v. Pa.* 21 Wall (88 U. S.) 492, 499; *Nardone v. United States,* 302 U. S. 379, 383; *United States v. Calif.,* 297 U. S. 175, 186.

> "• • • It can hardly be pretended, we think, that the rights of a sovereign state, admitted to the union on an equal footing with the original states in all respects whatever, can be taken away by implication."
>
> *Clay v. State,* 4 Kans. 49.

To the same effect is *People v. Godfrey,* 17 Johns. 225. The sovereignty of the union is at least of equal dignity with that of any component State.

A tax statute in derogation of sovereignty must be construed *strictissimi juris. Norfolk & Western Ry. v. Pendleton,* 156 U. S. 667, 673; *U. S. v. Herron,* 87 U. S. 251, 255, 263.

(d) Even if cession had been intended, it was not, and could not, be accepted by the City.

As the majority opinion points out (p. 32a), transfer of sovereignty is a matter of "mutually satisfactory arrangements", citing *Collins v. Yosemite Park Co.,* 304 U. S. 518, 528. An "arrangement" implies a meeting of the minds of the parties; an acceptance as well as an offer. "Acceptance is necessary", *Yellowstone Park etc. Co. v. Gallatin Co.,* 31 F. (2d) 644, 645; cert. den. 280 U. S. 555. So it was held with reference to retrocession by the United States of that portion of the District of Columbia that lay in Virginia. *McLaughlin v. Bank of Potomac,* (Ct. App., Va.) 7 Grat. 68, 70. And see Minority Opinion (pp. 55a, 56a).

If Act 819 may be construed as tendering to the City of Philadelphia a Federal grant of power to levy income taxes within the League Island area, there was certainly no formal acceptance of such a grant. City Council took no action *vis a vis* this supposed offer, and, as we show later, only the legislative branch may accept a grant which carries with it the correlative obligation of service.

The majority opinion in recognition of the necessity of finding an acceptance, declares that one may be presumed "in the absence of a contrary intent" (p. 32a). From this it must follow that in a converse case the burden is to be put upon an allegedly recipient sovereignty of showing that it did not accept the tendered cession. But the obligations of government may not be thus casually imposed. Acceptance of the power to levy taxes in a given area entails the reciprocal obligation of supplying service and protection to those subjected to the tax. *State Tax on Foreign Held Bonds*, 15 Wall. (82 U. S.) 300, 322; *Bristol v. Washington Co.*, 177 U. S. 133, 142; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592; *McKeon et al v. Council Bluffs* (Sup. Ct. Iowa 1928), 221 N. W. 351; *Courtney v. Louisville* (Ct. Apps., Ky. 1876), 12 Bush. 419. It would be a mischievous rule of law that could impose upon a state or municipality this consequence of accepting a grant of taxing power merely because it had not registered its refusal of the proffered grant.

The majority opinion cites *Silas Mason Co. v. Tax Comm.*, 302 U. S. 186, 207-208, as its sole authority for this doctrine of presumed acceptance. But the reliance is on dictum, as Chief Justice Maxey points out in his dissenting opinion (pp. 60a, 61a). Nor is what Mr. Chief Justice Hughes said in the *Mason* case accurately quoted in the majority opinion. He did not say that "acceptance will be presumed", but that "acceptance *may* be presumed in the absence of a contrary

intent." There is no justification for drawing from this general and undocumented expression the formulation of a principle of law which entitles the court below to assert that acceptance of a supposed grant of sovereignty by Public Act 819 will be presumed in the absence of proof of a contrary intent. No authority has been adduced to sustain so broad a proposition; the opinion below amounts to a substitution of "must" for "may" in the dictum cited.

A further and invincible objection to indulging the presumption of acceptance by the City is found in the indisputable fact that the City had no power to accept the grant. The point is not dealt with in the majority opinion. But it can not be overlooked. A municipal corporation has such powers and such only as the State confers upon it. *Mt. Pleasant v. Beckwith,* 100 U. S. 514; *Thompson v. Carroll,* 63 U. S. 422. Under Pennsylvania law the City "is the creature of the legislature and invested with subordinate governmental functions by its charter to be exercised and performed within certain territorial limits." *Elliott v. Monongahela City,* 229 Pa. 618, 79 A. 144, 145. "Local municipalities have none of the elements of sovereignty in them" (*Metropolis Theatre Co. v. Chicago,* 246 Ill. 20, 92 N. E. 597); and taxation is an incident of sovereignty (*Federal etc. Rwy. Co. v. Pittsburgh,* 226 Pa. 419, 75 A. 662), which may be exercised by a municipality only when made the subject of an express grant by the State. *Whelen's Appeal,* 108 Pa. 162, *Leslie v. Kite,* 192 Pa. 268, 43 A. 959.

The power of the City in this case to levy income taxes emanates from a single source—the Sterling Act (Appendix, p. 24.)—by which that power is circumscribed. It may be exercised only "within the limits of such City." See *Marson v. Philadelphia,* 342 Pa. 369, on pages 370 and 373. The City may not transcend those territorial limits and the Federal Congress cannot clothe it with authority to do so.

The City is the offspring of the State, not of the United States. The "limits" of its jurisdiction cannot be extended to embrace League Island by aught except state legislation. *Beaty v. Inlet Beach, Inc.,* (S. C. Fla., 1942), 9 So. 2d 735, 741. To presume that the City of Philadelphia accepted this supposed Federal grant would be to presume that it did what it had no power to do.

But had it the power, the mere fact that the mayor and municipal receiver of taxes have elected to enforce the Philadelphia Wage Tax ordinance against nonresidents working on League Island is not the legal equivalent of legislative acceptance of the supposed grant. The executive branch of the Government has no power to bind its people in such case; only its legislature may do so. *Meriwether v. Garrett,* 102 U. S. 472. Contracts and other dealings between states are accomplished by the acts of their respective legislatures. *Chesapeake, etc. Canal Co. v. Baltimore & Ohio Ruy.* (Ct. App., Md. 1832), 4 Gill & J. 1. Generally speaking,the powers of a state legislature are limited only by what is forbidden it in state and Federal constitutions. *Ware v. Hylton,* 3 Dall. 199, 1 L. Ed. 568. The reason of the general rule applies with equal force to the subsidiary city government where the same division of powers is found.

Acceptance of the obligations of protection that accompany the exercise of the power of taxation is a matter of public policy, determination of which does not fall within the orbit of executive power. It is confined solely to the legislative branch. *Baker v. U. S.,* 27 F. (2d) 863, cert. den. 278 U. S. 656. And if only the state legislature, and not the City Council, could accept a Federal grant of taxing power, even where the "grant" in terms refers to "any . . . duly constituted taxing authority" within such state, then where is the basis for a presumed acceptance by the city?

The anomaly of Congress making a direct grant of taxing

power to a state municipal corporation is a basic answer to the City's contention that Act 819 was intended as an act of cession, or that it was other than a declaratory act adopted in the interest of protecting existing taxing powers in the several states and their municipalities.

(e) Even if acceptance could be presumed, the new power of taxation thus supposedly ceded or granted to the City would have had to be exercised by adoption of a new ordinance. The Federal Act could not of itself extend the scope and force of the pre-existing tax ordinance.

Admittedly the wage tax ordinance of December 1939 did not give the City of Philadelphia the power to tax Federal employees in the situation of the plaintiff. If this ordinance, which was unenforceable against plaintiff in 1940-1941, may now be enforced against him, it is not by reason of any new legal doctrine declared by the Courts, but solely by reason of a new Federal statute. We know of no authority for according to such a statute the power to extend the scope of an existing municipal ordinance. "A power never possessed cannot expand." *Federal etc. Rwy. Co. v. Pittsburgh*, 226 Pa. 419, 75 A. 662, 664.

If advantage is to be taken of new powers supposedly made available to the municipality by federal statute, it must be done through subsequent legislative action, first by the State, then by the municipality. We must here avoid confusing two clearly distinguishable means of amending the law: restatement by decision, and restatement by statutory amendment. The court below appears not to have avoided such confusion by its reference to, and reliance on, the *Schaller* case, *supra* (majority opinion, pp. 42a, 43a).

This court, in denying Schaller's petition for certiorari in that case, impliedly approved what was said below as follows:

> "The construction placed upon a statute by the courts becomes a part of the statute and hence a part of the law thereby enacted. Crawford, Statutory Construction, 184; Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604. In further support of this conclusion we need only point to Graves v. People of State of New York ex rel. O'Keefe, decided in 1939." 148 Pa. Super. Ct. 276, 280.

But no such doctrine of relation back may be invoked to justify an enlarged application of a prior municipal ordinance by means of a new federal statute. To do so, as attempted below, would amount to judicial approval of executive substitution of an Act of Congress for essential and subsequent municipal legislation, as a basis for authority to tax the petitioner and his class. Therefore, since the City Council, as is admitted, did not intend in adopting its wage tax ordinance in December of 1939 to tax nonresident employees in the Navy Yard, then if it later acquired the power to tax this class by virtue of Act 819, it would still have to determine the policy of enforcing such a tax.

Now it is not claimed or determined below (although logically it would have to be to support the judgment) that Act 819 extended the territorial bounds of the City of Philadelphia so as to embrace League Island. All that is found by the majority opinion is that the Federal Government gave the City *power* to tax those working in that Federal area adjoining the City "as though such area was not a Federal area" (statute cited in note, p. 27a). But there is nothing in the State constitution or in fundamental mu-

nicipal law *requiring* that the City exercise the rights thus assumed to have been given it. Adverse considerations would have first to be weighed, notably whether the cost of supplying municipal facilities to this new area would warrant the tax levy. This question alone would have called for new and deliberate action by the City Fathers, action which could not be supplied, by the doctrine of relation back, to the terms of an old ordinance that had not contemplated taxation in this area.

The majority opinion reveals some consciousness of this difficulty, but the solution there attempted is plainly erroneous (p. 42a). For it does not follow, as assumed in the opinion, that because the *O'Keefe Case* (*supra*) so modified the doctrine of *McCulloch v. Maryland* 4 Wheat. (17 U. S.) 316, as to permit state taxation of federal salaries by virtue of a statute antedating the O'Keefe decision, therefore no new ordinance was needed in the instant case. This assumption fails, as said, to distinguish between the effect of judicial correction of judicially declared law and the effect of a new statute. Though the accepted presumption is that the unwritten law has always been what the courts have last declared it to be, a new statute altering previous legislation is effective only from its enactment. Thus a validating act cannot invest an earlier act with a power omitted from such earlier act. *Beaty v. Inlet Beach* (Fla. 1942), 9 So. (2d) 735, 741.

A fortiori should this be asserted when it is held, as in the decision below, that a federal statute may operate retroactively, and by implication only, to extend the scope of a prior state statute or a prior city ordinance. Congress could never have contemplated that Act 819 would have such an unheard of effect.

CONCLUSION.

The City's right to tax petitioner must depend upon jurisdiction over either his person or his property or his place of employment, and only by benefiting him in one or more of these capacities may the City justify its right to tax him. *Shaffer v. Carter,* 252 U. S. 37. None of these bases of jurisdiction is found in the case at bar. The City's attempt to enforce its ordinance against those who are not subject to it is, therefore, an attempted taking of property "without due process of law" and violative of individual rights under the Fourteenth Amendment. *Henderson Bridge Co. v. Henderson City,* 173 U. S. 592; *Union Transit Co. v. Kentucky,* 199 U. S. 194, 202, *Dane v. Jackson,* 256 U. S. 589.

Respectfully submitted,

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APPENDIX.

STERLING ACT.
No. 45.

AN ACT.

Empowering cities of the first and second classes to levy, assess and collect, or to provide for the levying, assessment and collection of, certain additional taxes for general revenue purposes; authorizing the establishment of bureaus, and the appointment and compensation of officers and employes to assess and collect such taxes; and permitting penalties to be imposed and enforced.

Section 1. Be it enacted, &c., That from and after the effective date of this act, the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment, and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first or second class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, and tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of

the first or second class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee. It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provision that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee.

Section 2. Cities of the first and second classes are hereby authorized to provide, by ordinance, for the creation of such bureaus, or the appointment and compensation of such officers, clerks, collectors, and other assistants and employes, either under existing departments or otherwise, as may be deemed necessary for the assessment and collection of taxes imposed under authority of this act.

Section 3. The council of cities of the first and second classes shall have power to prescribe and enforce penalties for the nonpayment, within the time fixed for their payment, of taxes imposed under authority of this act, and for the violation of the provisions of ordinances passed under authority of this act.

Section 4. This act shall become effective immediately upon its passage, and approval by the Governor. As to cities of the second class, this act shall remain in force only until June first, one thousand nine hundred and thirty-five, reserving to such cities the right to collect taxes assessed and levied prior to said date.

APPROVED—The 5th day of August, A. D. 1932.
GIFFORD PINCHOT.

PHILADELPHIA INCOME TAX ORDINANCE OF DECEMBER 13, 1939.

(Excerpts)

AN ORDINANCE

"Imposing a tax for general revenue purposes on salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia, and on salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia, and on the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on the net profits earned after January 1, 1939, of businesses, professions or other activities conducted in Philadelphia by non-residents; requiring the filing of returns and the giving of information by employers and those subject to the said tax; imposing on employers the duty of collecting the tax at source; providing for the administration, collection and enforcement of the said tax; and imposing penalties.

SECTION 1. *The Council of the City of Philadelphia ordains,* That the following words, when used in this ordinance, shall have the meaning ascribed to them in

this section, except where the context clearly indicates or requires a different meaning.

* * * * * * * * *

'Non-resident.' An individual, copartnership, association, or other entity domiciled outside the City of Philadelphia.

* * * * * * * * *

SECT. 2. IMPOSITION OF TAX. An annual tax for general revenue purposes of one and one-half per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; and on (c) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on (d) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted in Philadelphia by non-residents.

The tax levied under (a) and (b) herein shall relate to and be imposed upon salaries, wages, commissions and other compensation paid by an employer or on his behalf to any person who is employed by or renders services to him. The tax levied under (c) and (d) herein shall relate to and be imposed on the net profits of any business, profession or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons.

Said tax shall first be levied, collected and paid with respect to the salaries, wages, commissions and other compensation earned during the calendar year one thousand nine hundred and forty, and with respect to the net profits of businesses, professions or other activities, earned during the calendar year one thousand nine hundred and thirty-nine: *Provided, however*, That where the fiscal year of the business, profession, or other activity differs from the calendar year, the tax shall be applicable to the net profits of the fiscal year, with respect to such portion thereof as was earned subsequent to the thirty-first day of December, one thousand nine hundred and thirty-eight.

* * * * * * * * *

SECT. 10. APPLICABILITY. This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for."

* * * * * * * * *

PERTINENT PROVISIONS OF PUBLIC ACT #819 (U. S. C. TITLE 4, SECTIONS 14 et seq.)

Sec. 1 [This section has relation only to sales taxes].

"Sec. 2 (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full juris-

diction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

Sec. 3 (a) The provisions of sections 1 and 2 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) [This subsection defines purchases of merchandise in Government areas].

Sec. 4. The provisions of sections 1-6 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

Sec. 5 [This section relates to taxes on Indians].

Sec. 6. As used in sections 1-5 of this title—

(a) The term 'person' shall have the meaning assigned to it in section 3797 of Title 26.

(b) The term 'sales or use tax' means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 12 of this title are applicable.

(c) The term 'income tax' means any tax levied on,

with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term 'state' includes any Territory or possession of the United States.

(e) The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State."

IN THE

Supreme Court of the United States

No. 118. October Term, 1943.

HOWARD KIKER,
Petitioner-Plaintiff,

v.

CITY OF PHILADELPHIA, BERNARD SAMUEL, Acting Mayor of Philadelphia, DAVID W. HARRIS, Receiver of Taxes and ERNEST LOWENGRUND, Acting City Solicitor,
Defendants-Respondents.

ANSWER AND BRIEF OF DEFENDANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of the defendants to the petition for writ of certiorari to the Supreme Court of Pennsylvania respectfully represents:

(a) The petitioner is requesting your Honorable Court to review the judgment of the Supreme Court of Pennsyl-

vania which held that the compensation received from a non-resident employed by the government in a federal area, known as "League Island Navy Yard" is subject to the non-discriminatory income tax imposed by the City of Philadelphia on December 13, 1939. This petitioner, although employed at the League Island Navy Yard for 16 years did not file his bill of complaint until December 16, 1942. From January 1, 1940 until December 16, 1942 considerable sums of money were collected by the City of Philadelphia under this Income Tax Ordinance from non-residents employed in federal areas. The petition in the present proceeding was not filed with your Honorable Court until June 25, 1943, whereas the opinion of the Supreme Court of Pennsylvania was filed March 29, 1943.

It may be of interest to observe that another federal employee working at the League Island Navy Yard also filed his petition with this Honorable Court for the allowance of a writ of certiorari on July 2, 1942, although the Superior Court of Pennsylvania rendered its decision on March 13, 1942, and the Supreme Court of Pennsylvania refused to allow an allocatur on April 10, 1942; (cert. den. by this Court.) (PHILADELPHIA v. SCHALLER, 87 L. Ed. 38, 63 Sup. Ct. 43).

I. STATEMENT OF QUESTIONS INVOLVED.

1. Was League Island within the territorial, geographical and political boundaries of the City of Philadelphia prior to the time that title thereto was ceded to the United States?

2. Is League Island within the exterior boundaries of Pennsylvania so as to fall within the definition of "Federal area" as appearing in Section 6 of Public Act 819 (4 U. S. C. A. sec. 18)?

3. Do the words "Federal area" as used in Public Act 819 embrace lands previously ceded to the United States where exclusive jurisdiction over such area was granted to the United States?

4. Must a state accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

II. ARGUMENT.

1. Was League Island within the territorial, geographical and political boundaries of the City of Philadelphia prior to the time that title thereto was ceded to the United States?

In the majority opinion filed in the instant case the Supreme Court of Pennsylvania said (p. 292, 31 A. 2d):

> "League Island lies on the westerly bank of the Delaware River, just above the mouth of the Schuylkill, and originally was a part of the City of Philadelphia."

On page 295 of the same opinion the State Supreme Court cites several legal authorities to support the principle that the court may take judicial notice of this fact.

On page 13 of the appellee's brief filed with the State Supreme Court, the City of Philadelphia referred to the ordinance of City Council of April 9, 1864, page 151, wherein the City Solicitor is authorized to examine the title to the whole of League Island, which is described therein as "being in the first ward of the City of Philadelphia"; and it is further stated that the sum of $340,000 is appropriated for the purchase of League Island from the Pennsylvania Company and the Mayor is requested to tender League Island to the United States Government as a location for a navy yard or naval depot. On the same page of the City's brief reference was made to the Ordinance of Council of July 23, 1867, page 261, wherein it was stated that under an Act of Congress of February 18, 1867, the Secretary of the Navy was authorized to accept title to League Island from the City of Philadelphia.

On page 12 of the same brief reference is made to the

Act of February 10, 1863, P. L. 24, 74 P. S. §1, note under which Act title to League Island was ceded to the United States, which Act reads in part as follows:

> "That the consent of the Commonwealth of Pennsylvania is hereby granted to the United States of America, to purchase and acquire title to all that island in the Delaware River, at and above the mouth of the Schuylkill River, in the City and County of Philadelphia, called and known as 'League Island' * * *."

It will thus be observed that the Supreme Court of Pennsylvania was fully justified in taking judicial notice of the fact that League Island was originally a part of the City of Philadelphia.

2. Is League Island within the exterior boundaries of Pennsylvania so as to fall within the definition of "Federal area" as appearing in Section 6 of Public Act 819 (4 U. S. C. A. sec. 18)?

On October 9, 1940 Congress enacted Public Act 819, 54 Stat. 1059, 1060, 4 U. S. C. A. sections 13 to 18. Therein it was provided that no person shall be relieved from liability for the payment of any sales, use tax or income tax levied by any state, or by any duly constituted taxing authority having jurisdiction to levy such a tax by reason of his residing within the federal area or because the sale or use with respect to which such tax is levied occurred in whole or in part within a federal area or by reason of such person receiving income from transactions occurring or services performed in such area. *It was further provided that any such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same*

extent and with the same effect as though such area was not a federal area.

Section 6 of this Act defines federal areas as follows:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any state shall be deemed to be a Federal area located within such state."

The question therefore arises whether League Island is located "within the exterior boundaries of the State of Pennsylvania".

In the majority opinion filed by the Supreme Court of Pennsylvania in the present case the following was stated (p. 295 of 31 A. 2d):

> "The area in which plaintiff is employed or engaged is actually no longer an island, but is now physically a part of the main land of this commonwealth. The reservation is immediately adjacent to Philadelphia; is geographically within its limits * * *".

It was further stated in the majority opinion (p. 297):

> "Plaintiff argues that the phrase of the ordinance 'in Philadelphia' excluded League Island because it is not within Philadelphia. This contention is without merit, for obviously that phrase was intended to mean within the geographical limits of the city. As is clearly shown by the Act of February 2, 1854[6] (incorporating the City) and the statutes granting consent to its purchase and ceding jurisdiction over League Island, as well as the Federal Government's certificate of acceptance thereof, the reservation is within the City's territorial boundaries and the area comprising the island is not, by the phrase 'in Phila-

delphia' excluded from the rest of the City where the tax is clearly applicable".

In note "6" the following statement appears:

"That statute (Act of February 2, 1854) shows League Island to be in the first ward of the City of Philadelphia".

We therefore have a legal finding by the highest court of the State of Pennsylvania to the effect that League Island is located within the exterior boundaries of the State of Pennsylvania, and therefore comes within the definition of "federal area" as contained in section 6 of Public Act 819.

This subject matter is more fully discussed on the first four pages of the reply brief for appellees filed with the State Supreme Court.

3. Do the words "Federal area" as used in Public Act 819 embrace lands previously ceded to the United States where exclusive jurisdiction over such area was granted to the United States?

It would seem obvious that if League Island Navy Yard falls within the definition of "federal area" as contained in section 6 of Public Act 819, the benefits conferred by Public Act 819 should enable the City of Philadelphia to include within the provisions of the ordinance of December 13, 1939 the compensation earned by non-residents at the navy yard.

The plaintiff, however, argues that Public Act 819 was only aimed to clarify and declare the law as it existed prior to October 9, 1940; and by reason thereof it can only apply to a situation where at the time of cession a state reserved unto itself concurrent taxing jurisdiction. Consequently, the plaintiff argues that Public Act 819 does

not apply to Pennsylvania or Philadelphia because at the time League Island was ceded to the Government, the State did not reserve concurrent taxing jurisdiction, but granted to the Government exclusive jurisdiction.

It is respectfully urged that this reasoning cannot stand the test of analysis. It is not disputed by the plaintiff that when a state ceding any portion of its territory to the Federal Government reserves concurrent taxing jurisdiction, that it has the power to impose *all* types of taxes within the area so ceded. Hence, if Public Act 819 aimed at declaring the law as it existed then it should have granted permission to states reserving taxing jurisdiction at the time of ceding any of its territory to the Government to impose *all* types of taxes. For illustration, in such a situation a state would not only have the right to impose sales, use, or income taxes, but also personal property taxes, documentary stamp taxes, amusement taxes, real estate taxes, taxes on open air parking lots and various other varieties of taxes which the human mind can suggest. *But in Public Act 819 Congress limited the right of taxation to three types of taxes, namely, sales, use or income taxes.*

It will thus be seen that instead of Congress declaring the law as it existed when applied to states reserving taxing jurisdiction, not only confused such law but actually cut down such taxing authority and deprived the state of exercising its taxing powers as to other forms of taxation.

It is extremely doubtful whether such an act would be constitutional in taking away from a state, reserving unto itself its taxing power, any part of such power. But, apart from that consideration, it seems absurd to contend that Congress in aiming at declaring the law as it existed would not only create confusion but attempt to restrict and limit any taxing powers reserved to the state. And yet that is the conclusion to which one is irresistibly drawn, if the plaintiff's position were adopted.

It therefore follows that the only logical and sane

interpretation of Public Act 819 is, that it must necessarily apply to a situation where on October 9, 1940 a state did not possess the power to impose any type of taxes in federal areas; such as Pennsylvania, where exclusive jurisdiction was granted to the Federal Government at the time the land was ceded.

This view is fortified by examining section 4 of Public Act 819, which reads:

> "The provisions of this act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area *over which it would otherwise have exclusive jurisdiction* or to limit the jurisdiction of the United States over any Federal area." (Italics supplied.)

There would be no reason for section 4 to appear in Public Act 819 if the act is intended only to apply to a case where concurrent jurisdiction was reserved at the time of cession; because there the Government never had exclusive jurisdiction and it would be folly for Congress to say that the provisions of Public Act 819 shall not be deemed to deprive the United States of exclusive jurisdiction over any federal area over which it would otherwise have exclusive jurisdiction.

Such language is entirely superfluous and meaningless if the plaintiff's position is correct.

The fact that Congress took the precaution by section 4 to state that the granting by it to a state or taxing authority the right to impose sales, use or income taxes should not deprive the United States of exclusive jurisdiction where it otherwise would have had exclusive jurisdiction indicates beyond a doubt that Public Act 819 was only aimed at situations where exclusive jurisdiction was granted to the Federal Government at the time of cession.

In the dissenting opinion of the State Supreme Court an observation is made that there seems to be a similarity

between the phrase "by any duly constituted taxing authority having jurisdiction to tax such compensation," which appears in the Public Salary Tax Act of April 12, 1939, c. 59, title I, sec. 4, 53 Stat. 575, 26 U.S.C.A. 22, 5 U.S.C.A. Sec. 84(a); and the phrase "having jurisdiction to levy such a tax" which appears in Public Act 819. It is therefore contended by the minority that the same meaning should be given to the phrase appearing in Act 819 as Congress intended should be given to the phrase appearing in the 1939 Act.

It seems quite clear that in the 1939 Act the word "jurisdiction" was not intended to refer to any *area* but rather to the *power* of the taxing authority to impose the type of a tax, which would include compensation of federal employees, such as wage taxes or income taxes.

The question of jurisdiction over a particular area or territory was not involved in the 1939 Act. The only purpose of the 1939 Act was to prevent the taxing of salaries of public employees prior to January 1, 1939.

It follows that since the word "jurisdiction" used in the 1939 Act was not intended to refer to *area* or *territory,* but rather to the *power* of the taxing authorities to impose the type of tax which would reach compensation of federal employees, that in 1940 Congress intended that the word "jurisdiction" should have the same meaning.

It seems surprising that if Congress had intended that Public Act 819 should only apply where the state or taxing authority already had jurisdiction over the territory that it could not have said so in plain language.

Congress by Public Act 819 was relinquishing taxing jurisdiction in sales, use, or income taxes to the State or taxing authority from whom it had received exclusive jurisdiction, and that accounts for the definition of federal area in section 6 of Act 819, and the cautionary provision contained in section 4 that Congress did not intend thereby to relinquish its entire exclusive jurisdiction; and the further provision that "such state or taxing authority shall have full jurisdiction and power to levy and collect such

tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area."

All of the aforesaid provisions would have been unnecessary if Congress had only intended to declare what the existing law was, namely, that where a state or taxing authority has reserved taxing jurisdiction it may continue to impose sales, use or income taxes in such areas.

4. Must a state accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

The Supreme Court of Pennsylvania in the majority opinion states that an acceptance of recession of jurisdiction from the federal government will be presumed in the absence of a contrary intent.

Although the defendants do not concede that an acceptance of recession of jurisdiction from the federal government is necessary before it can become valid, nevertheless it is true that such acceptance will be presumed in the absence of a contrary intent.

In the case of FORT LEAVENWORTH RAILWAY CO. v. LOWE, 114 U.S. 525, 528, 29 L. Ed. 264, 265, this Court said:

> "As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the Act is to be presumed in the absence of any dissent on their part."

In the instant case when Congress by Public Act 819 relinquished its exclusive jurisdiction in regard to sales, use or income taxes and permitted a state or taxing authority to impose those taxes in federal areas with the same force and effect as if they were never any federal areas, it

was conferring a benefit upon Philadelphia or any other taxing authority which had granted exclusive jurisdiction to the federal government. Hence, the acceptance of such limited jurisdiction and power is presumed in the absence of any dissent on the part of the State of Pennsylvania or the City of Philadelphia.

Public Act 819 has been in force for almost three years, and the State of Pennsylvania has not placed on record any dissent or dissatisfaction with the Act.

Defendants, however, respectfully submit that it is not necessary for the State of Pennsylvania to either affirmatively or impliedly accept a recession or relinquishment of jurisdiction from the federal government.

No legal citation appears either in the majority or dissenting opinion filed by the State Supreme Court to support the proposition that a recession of jurisdiction by the federal government must be accepted by the state before it will be valid.

The case of YELLOWSTONE PARK TRANSP. CO. v. GALLATIN COUNTY, 31 Fed. 2d 644, cert. den. 280 U.S. 555 appearing in the majority opinion does not involve the question of a recession of jurisdiction from the federal government to a state. On the contrary, it involves the question of whether it is necessary for Congress to accept exclusive jurisdiction before it will become effective.

This will appear from the following language (p. 645):

> "Again, it is contended that there was no acceptance of the cession of exclusive jurisdiction by Congress. It will, of course, be conceded that such an acceptance is necessary, but the acceptance may be implied from other legislation."

The law seems to be that it is not necessary for a state to either formally or impliedly accept a recession or relinquishment of jurisdiction from the federal government. This was squarely decided in RENNER v. BENNETT, 21 Ohio St. Rep. 431 (1871).

In that case Congress ceded back certain jurisdiction to the State of Ohio. A resolution to accept this jurisdiction by the State of Ohio was defeated. Later the question arose whether votes from the ceded territory on behalf of the candidate for the office of Coroner should be counted. This necessarily involved the question of whether the retrocession of jurisdiction over the ceded territory by the federal government was effective without acceptance by the State of Ohio. The Supreme Court, in disposing of that question, said: (p. 445)

> "2. Is the consent of the State necessary in order to the retrocession or relinquishment of jurisdiction?
>
> We are quite clear in the opinion that it is not. The cession by the State was not a cession of absolute and perpetual jurisdiction. It was in effect, a mere suspension of jurisdiction. The State jurisdiction was not extinguished by the grant, but merely suspended. There was a reversion left in the State. This is so, because the purposes for which the grant was made are temporary. The right to exercise the jurisdiction granted was to be exclusive while it continued, but it was to be a mere temporary right. It could not, at the farthest, out-last the lives of the 'disabled volunteers in the late rebellion,' and it was liable at any time to be terminated by an abandonment, or diversion of the property from the purposes of the grant. The thing really granted *was jurisdiction during the pleasure of congress, but not to be extended beyond the lives of the soldiers.* When congress abandons the jurisdiction, or when the disabled soldiers all die, the thing granted, which was at first indeterminate, has been terminated, and fully enjoyed, and expires by its own limitation. The fact that the legislature of Ohio refused to accept the jurisdiction so receded, or relinquished, has no significance. The very ground of that refusal may have been that there was no necessity for such acceptance."

This case was cited by the United States Supreme Court in ARLINGTON HOTEL CO. v. FANT, 278 U.S. 445, 455; 73 L. Ed. 447, 452; by Circuit Judge Stone (now Chief Justice) in the case of WILLIAMS v. ARLINGTON HOTEL CO. 22 Fed. 2d 669, 671; by Circuit Judge Taft in In re THOMAS, 82 Fed. Rep. 304, 308, and in YELLOW CAB TRANSIT CO. v. JOHNSON, 48 F. Suppl. 594, 600 (1942) W. D. Oklahoma, where the Court said:

> "The case of Renner v. Bennett (21 Ohio St. Rep. 431), is authority for the rule that acceptance of the act of recession is unnecessary."

It was pointed out by the Supreme Court of Ohio that it is well settled that Congress may divest itself of the acquired jurisdiction and restore it to the state, by abandonment of its use, or by parting with the ownership.

The Court further reasoned that jurisdiction so acquired by the federal government is not an *original* or *inherent* power of Congress. It is a *secondary* and *acquired* power and Congress can exist without such power. The original and inherent power of Congress was the *power to acquire* the jurisdiction, and not the *jurisdiction* itself. The constitution divested the state of no jurisdiction, and, thereover, vested none in Congress. The transfer of jurisdiction to Congress is a matter which belongs exclusively to the state and Congress. The constitution had no agency in the transfer. It found the jurisdiction in the State, and left it there. It merely gives to Congress the power to acquire and use the thing granted, and prescribes a *form* or *manner* in which the grant may be made.

The Supreme Court of the State of Ohio further observed that the ceded territory never ceased to be a part of the state geographically, although the state jurisdiction over it has been temporarily suspended. This last thought finds support in the language used by this Court in the case of CHICAGO, ROCK ISLAND AND PACIFIC RY. CO. v. McGLINN, 114 U.S. 542, 546; 29 L. Ed. 270, 271, where it was said:

> "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another the municipal law of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign."

In the case of WILLIAMS v. ARLINGTON HOTEL CO., 22 F. 2d 669, 671, Judge Stone (now Chief Justice) said:

> "The McGlinn case is direct authority for the contention made by plaintiff in error that the laws of the state in existence at the time of the cession continue upon the reservation where not inconsistent with the laws of the United States or where not abrogated by Congress after the cession."

In the case of FORT LEAVENWORTH RAILWAY CO. v. LOWE, 114 U.S. 525, 542, 29 L. Ed. 264, 270, this Court said:

> "It is necessarily temporary, to be exercised as long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the state."

In the instant case the cession of exclusive jurisdiction over League Island was made on this condition:

> "Providing, however, that the cession * * * made shall continue in force as long as the * * * territory shall be used by the Government of the United States for the purpose of a navy yard, and *no longer*." (Italics supplied.)

It may be inquired what would happen if the Government ceased to use League Island for the purposes of a navy yard. Under the act of cession the federal Government would cease to have exclusive jurisdiction thereof.

Suppose Pennsylvania never formally accepted jurisdiction over League Island, or, as was done in the Ohio case, suppose Pennsylvania refuses to accept jurisdiction over League Island? Would jurisdiction over League Island then be suspended like Mohammed's coffin so that neither the federal government nor the State of Pennsylvania would have any jurisdiction thereof? Such a situation is unthinkable. And yet, if a recession or surrender of jurisdiction by the federal government must be formally accepted by the State, then such an absurd result would follow.

If jurisdiction over League Island would immediately vest in the State of Pennsylvania when the Government ceased to use League Island as a navy yard, regardless of whether Pennsylvania would formally accept such jurisdiction, the same result would follow when Congress voluntarily surrenders or yields a portion of its original jurisdiction to the State.

In the dissenting opinion in the instant case it is pointed out that since Congress had to formally accept exclusive jurisdiction, it follows that the state must formally accept a recession of said jurisdiction. The writer of the dissenting opinion, however, overlooks the fact that the reason for the necessity of formal acceptance by Congress was because in the act of cession it was stated that such exclusive jurisdiction shall only become effective after title to the land shall be accepted by Congress; but nowhere is it stated that a recession of such jurisdiction shall not become effective until formally accepted by the State of Pennsylvania.

Since the jurisdiction that was granted to the federal government over League Island was necessarily temporary in the sense that it terminated when League Island was no longer used as a navy yard, the thought expressed by the

Supreme Court of Ohio that the state jurisdiction over such ceded territory has been temporarily suspended applies; and if such jurisdiction has only been temporarily suspended then no logical reason appears why Congress cannot return a portion of said jurisdiction to the ceding state without the necessity of the formal acceptance of the same by the state.

Plaintiff further contends that the Ordinance of December 13, 1939 cannot apply to a situation created after December 31, 1940 by Public Act 819, because when the City Ordinance was passed the City had no power to impose income taxes against non-residents earning compensation at League Island.

In advancing such a contention the plaintiff overlooks the language of the Supreme Court of Pennsylvania in the case of BLAUNER'S INC. v. PHILADELPHIA, 330 Pa. 342, 348, 198 A. 889:

> "We think the same power is vested in the City of Philadelphia by the Sterling Act, supra, which authorizes it 'to levy, assess, and collect, or provide for the levying, assessment and collection' of taxes * * *. Under such a broad legislative grant the City's power of collection is limited only by constitutional restriction."

In other words, the State of Pennsylvania delegated to the City of Philadelphia under the Sterling Act, August 5, 1932, P.L. 45, 53 P.S. 4613, in such fields of taxation where the State has not entered, the same broad powers possessed by the State. Consequently, if in 1939 the State had an income tax which did not at that time apply to non-resident federal employees earning compensation at League Island, after January 1, 1941, the State would not have to adopt a special act agreeing that it would accept the benefits of Public Act 819 before it would have the right to include within such income tax the compensation earned by a non-resident federal employee at League Island.

This was squarely decided by the Superior Court of Pennsylvania in the case of PHILADELPHIA v. SCHALLER, 148 Penna. Super. Ct. 276, 282, 25 A. 2d 406, 410, where the Court said:

> "When the disability of the state to tax federal incomes was removed, there was no need for a re-enactment of the legislation to reach incomes formerly exempt; the powers originally granted, broad enough to include all income regardless of the source, were sufficient for the purpose."

Since the Supreme Court of Pennsylvania refused an allocatur and the Supreme Court of the United States denied a writ of certiorari (87 L. Ed. 38, 63 Sup. Ct. 43) it may be assumed that the language quoted hereinabove from the opinion of the Superior Court was approved by the State Supreme Court and the United States Supreme Court.

If this be true as regards the State of Pennsylvania, then it follows that it should be applicable to the powers of the City of Philadelphia granted to it by the State to impose income taxes. Hence, since the City's power of collection of income taxes is limited only by constitutional restrictions, and since the State legislature transferred all the taxing powers possessed by the State, then there would be no occasion for the City of Philadelphia to obtain consent from the State of Pennsylvania to include within its Income Tax Ordinance of 1939 the compensation earned by non-resident federal employees at League Island.

In other words, Philadelphia stepped into the shoes of the State of Pennsylvania as regards the right and power to impose income taxes; and since Pennsylvania would not be compelled to adopt a new law imposing income taxes on non-residents working in the navy yard after January 1, 1941, if prior to that time it had a general income tax, it follows that the City of Philadelphia did not have to adopt a new ordinance.

Petitioner further argues that this compensation earned at the navy yard cannot be taxed because he received none of the benefits that the City affords to others who either reside or work in Philadelphia.

The Supreme Court of Pennsylvania effectively answered that contention on pages 294 and 295 of 31 A. 2d. There the Supreme Court points out all the benefits that the plaintiff is not only entitled to receive from the City of Philadelphia but actually receives.

In SHAFFER v. HOWARD, 250 Fed. 873, Circuit Judge Stone (now Chief Justice of the United States) discusses extensively the right of a state to tax the *privilege of receiving income* within its confines, whether the person receiving such income does or does not reside therein.

In SHAFFER v. CARTER, 252 U.S. 37, 64 L. Ed. 445, 457, this Court said:

> "* * * it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the Government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally, yet to the extent of his property held or his occupation or business carried on therein to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. Sec. 2 of art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, *nor to any preferential treatment as compared with resident citizens.* It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452." (Italics supplied.)

In RAINER NATIONAL PARK COMPANY v. MARTIN, 18 F. Suppl. 481, 488 aff. 302 U.S. 661, 82 L. ed. 511, it was said:

> "Further it is qualified to do business in the state, and as such could take advantage of the protection afforded. Simply because it does not take advantage of such protection is no reason for declaring a tax void, when the protection is available."

The defendants therefore respectfully suggest to this Honorable Court that there appear no substantial reasons why the majority opinion of the Supreme Court of Pennsylvania should be reviewed by this Court.

WHEREFORE, defendants pray your Honorable Court to dismiss the petition for writ of certiorari.

CITY OF PHILADELPHIA,
By WALTER CAMENISCH,
Deputy Receiver of Taxes in charge of Philadelphia Income Tax.

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END OF A CASE